

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 3, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1272

Cir. Ct. No. 2012CV371

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

AUDREY GALLOW AND ROBERT GALLOW,

PLAINTIFFS-RESPONDENTS,

V.

BERT F. ROEHL,

DEFENDANT-APPELLANT,

**ZENITH ACQUISITION CORP. AS SUCCESSOR IN INTEREST TO
US BANK, LVNV FUNDING LLC AND PORTFOLIO RECOVERY
ASSOCIATES LLC,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Shawano County:
JAMES R. HABECK, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Bert Roehl appeals a summary judgment of foreclosure granted in favor of Audrey and Robert Gallow. We affirm.

¶2 On April 19, 2006, Roehl executed a mortgage on his homestead parcel in favor of the Gallows to secure payment of \$104,907.37. The mortgage listed Parcel Identification Number 012-20330-0010, together with the following legal description:

Lot 1 of Certified Survey Map No. 2335, recorded in the Office of the Register of Deeds for Shawano County on June 25, 2001, in Volume 8 of Records on pages 326-27, being a part of the SW ¼ of the SW ¼ of Section 20, Township 28 North, Range 11 East. Pin: 012-20330-0010.

¶3 On September 13, 2010, Roehl executed a “Demand Mortgage Note,” which contained the following statement: “This is a replacement / renewal Note for Original Note / Debt on or about April 19, 2006, in the original principal sum of \$104,907.37.”

¶4 On November 16, 2012, the Gallows commenced foreclosure proceedings on Roehl’s homestead property. An amended complaint was filed on March 25, 2013.¹ The amended complaint contained the same legal description and parcel identification number listed on the 2006 mortgage. The Gallows

¹ The record appears to indicate the amended complaint was not answered.

moved for summary judgment, which the circuit court granted after a hearing. Roehl now appeals.²

¶5 Roehl argues the original April 19, 2006 note was not produced, and the missing original note was necessary to foreclose. However, “[a] mortgage secures the debt, not the note.” *Mitchell Bank v. Schanke*, 2004 WI 13, ¶41, 268 Wis. 2d 571, 676 N.W.2d 849. A note is not a debt, it is only primary evidence of a debt. *Id.* As the *Mitchell Bank* court stated: “Therefore, it matters not whether the Note itself is produced, as long as the Bank can prove the underlying debt secured by the Mortgage: ‘A mortgage is only an incident to a debt, which is the principal thing.’” *Id.*, ¶43 (citation omitted).

¶6 Here, the April 19, 2006 mortgage identified the debt it secured. The mortgage specifically stated that it secured payment of \$104,907.37. The mortgage also expressly secured “any extensions, and renewals and modifications of the note(s) and refinancings of any such indebtedness on any terms whatsoever” Finally, the mortgage clearly identified not only the legal description of the property but also the parcel identification number.

² Roehl moved this court to supplement the record with a Satisfaction of Mortgage. By order dated March 6, 2015, we denied the motion, noting the Satisfaction of Mortgage referenced a different property description and mortgage. We also noted that during the pendency of this motion, the law license of Roehl’s attorney was revoked. To give Roehl time to file his reply brief with newly-retained counsel, we sua sponte extended the briefing deadline. After Roehl’s new counsel filed a reply brief, we granted a motion to strike the reply brief on the grounds that it not only referenced the Satisfaction of Mortgage, but centered the arguments in the reply brief around it. We again on our own motion extended the time for counsel to file a reply brief. Roehl’s counsel subsequently notified this court, “We will not be filing a Reply Brief for the above referenced matter.” On October 7, 2015, we denied Roehl’s pro se motion to “start over” to “revert back to the civil courts,” and for representation of counsel “during the civil and appellate portions of this case.”

¶7 Roehl executed the 2010 “Demand Mortgage Note,” which specifically referenced the original \$104,907.37 indebtedness identified in the April 19, 2006 mortgage. The Demand Mortgage Note also stated a specific unpaid principal balance as of June 15, 2009, and that Roehl owed that principal sum with interest at the rate of 6% per annum until fully paid.³

¶8 Roehl insists the Demand Mortgage Note was secured by a mortgage on an adjacent forty-acre parcel, not the homestead property. This argument is disingenuous. The adjacent forty-acre parcel is identified by a different legal description and parcel identification number. As the circuit court stated at the summary judgment hearing:

So then now I have got the September 13, 2010 note. And the September 13, 2010 [note], talks specifically about it being a replacement note for the one done on April 19, 2006. April 19, 2006 is the date of the mortgage on the homestead parcel, not the 40 [acre parcel]. It's the same date. So it's the same date referred to in the replacement note.

And there from the September of 2010 [note], I have Mr. Roehl's signature followed by a notary public signing, and it looks like she put her seal on as well. Nobody really challenged whether Mr. Roehl signed that.

¶9 The circuit court correctly observed that the 2010 note “acknowledged the pre-existing payment that ties up with the exact date for the pre-existing [2006] mortgage there.” As the court concluded, “the terms of this demand mortgage note specifically acknowledged the validity of that prior debt.”

³ During the summary judgment hearing, counsel for the Gallows represented to the circuit court, “the last payment we received from Bert Roehl was received on June 15, 2009. At that time the balance was \$98,406. Then there was a payment made with the closing on some real estate that brought the balance down There have been no payments since 11-15-2010.”

Indeed, Roehl failed to explain why he would have signed the Demand Mortgage Note if he did not acknowledge the validity of an original note dated April 19, 2006 in the principal sum of \$104,907.37.

¶10 The facts of record establish Roehl executed the April 19, 2006 mortgage securing the underlying debt on his homestead property. Roehl subsequently executed the 2010 Demand Mortgage Note acknowledging the original principal debt consistent with the 2006 mortgage, as well as the unpaid principal balance. Roehl defaulted on the debt and summary judgment of foreclosure was properly granted.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

